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No. 99-905

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

ARMSTRONG SURGICAL CENTER, INC.,
Petitioner,

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL; ROGELIO BORJA; RICHARD BOSCO; ZAFAR CHOWDHRY; JEFFREY DAVID; FRANK DAVIE; EGBERT DEVRIES; PAUL L. FREDERICK; JOHN GARROTT; FRANK N. GENOVESE; IRVING KLEIN; DAVID H. KOHL; LEE H. KOSTER; JOHN MARTY; MICHAEL P. ONDICH; KARL R. SALTRICK; WILLIS SHOOK; ANTHONY SMALDINO; PETER SOTOS; JAE T. YANG,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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I. STANDARD OF REVIEW

1. The Respondents' brief is replete with irrelevant facts and misstatements of fact that it directs attention away from the proper standard of review in considering a 12(b)(6) Motion to Dismiss. Under Fed. R. Civ. P. 12(b)(6) this Court is required to accept as true the factual allegations as set forth in Petitioner's Complaint and all reasonable inferences that can be drawn therefrom. As stated by this Court in *Hospital Building Co. v.*

Trustees of Rex Hospital, 425 U.S. 738 (1976) at pages 746-747 that:

> "We have held that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act."

The Third Circuit did not do this.

In addition, the Third Circuit ignored the illegal conspiracy and other antitrust violations of Respondents and thus, in effect, has overruled its own holding in *Massachusetts School of Law v. American Bar Association,* 107 F.3d 1026 (3d Cir. 1997), where it stated at page 1038:

> "There is an exception to Noerr immunity that would apply if ABA 'attempted directly to persuade anyone not to deal with' MSL. See *Noerr,* 365 U.S. at 142, 81 S. Ct. at 532. There is no evidence that the ABA made such an attempt (there was such evidence in *Allied Tube*), nor is there any other evidence suggesting that *Noerr* immunity should not apply here."

Petitioner has pleaded that Respondent Hospital and the Respondent Physicians have engaged in more abusive antitrust violations than what *Massachusetts School of Law* held would deny *Noerr-Pennington* immunity, and on a motion to dismiss, Petitioner's pleadings have met this Court's standard as set forth in *Rex Hospital.* (Resp. Br. in Opp. App. at 1-21.)

II. MISSTATEMENTS AND OTHER COMMENTS

1. Respondents open their brief with the statement: "In 1990, a group of investors, including counsel for Petitioner, decided to build an outpatient ambulatory surgical center in Armstrong County—Armstrong Surgical Center, Inc. . . ." (Resp. Br. in Opp. at 1.) Counsel of record for Petitioner, James G. Park, Esquire and Henry W. Fulton, Jr., Esquire are not now and have never been investors in the Petitioner. John P. Klee, one of the counsel for Petitioner, is a shareholder of the Petitioner, for whatever relevance that may have.

2. All the cases cited by Respondents (Resp. Br. in Opp. at 5-6) are not applicable to the factual situation as pleaded by Petitioner in that in all of the cases cited, there was no illegal activity by the party who was opposing the application of its competitor and thus *Noerr* immunity applied.

3. Petitioner did not allege that Respondents misrepresented that there was no outpatient surgery being done at the Respondent Hospital. (Resp. Br. in Opp. at 6.) To the contrary, Petitioner alleged that Respondent Physicians knowingly misrepresented that they were doing their outpatient surgery in Respondent Hospital's new Ambulatory Surgery Center which did not exist. (Resp. Br. in Opp. App. at 12-13.) This misrepresentation was then coupled with another misrepresentation that the Respondent Hospital outpatient surgery charges were lower than Petitioner ASC charges when in fact, in Armstrong County where 63% of all surgery is on Medicare patients (Resp. Br. in Opp. App. at 14, ¶ 41), the yearly savings from use of Petitioner's ASC over Respondent Hospital would be over $2,800,000 with $1,600,000 saved on all surgery (at $400 per surgery) and an additional $1,200,000 (at $455 per surgery) saved on the 20% Medicare copayment obligation of a Medicare patient (Resp. Br. in Opp. App. at 16, ¶¶ 52, 53, 54). This disparity in charges was due

to the fact that Respondent Hospital was still doing its outpatient surgery in its inpatient operating rooms and not in its phantom Ambulatory Surgery Center. (Resp. Br. in Opp. App. at 15, ¶¶ 49-51.)

4 Respondents state that "there is no allegation that Respondents petitioned the Department and the State Board for any purpose other than obtaining favorable governmental action." (Resp. Br. in Opp. at 10.) This is patently false. The Respondent Physicians entered into the illegal boycott and illegally conspired with the Respondent Hospital to *knowingly* (emphasis added) make the misrepresentations in the administrative proceedings (Resp. Br. in Opp. App. at 11-13) and later in the appeal to the Commonwealth Court of Pennsylvania for the sole purpose of maintaining their respective monopolies for their continued financial benefit (Resp. Br. in Opp. App. at 7-11) to the detriment of the Petitioner (Resp. Br. in Opp. App. at 17-18) and the public. (Resp. Br. in Opp. App. at 15-16.) These illegal activities are classic per se violations of the Sherman Act by the Respondent Physicians and the Respondent Hospital. (Resp. Br. in Opp. App. at 11-13.) See *F.T.C. v. Superior Court Trial Lawyer's Association*, 493 U.S. 411 (1990).

III. GOVERNMENT ACTION AND PROXIMATE CAUSE

Respondents' brief in opposition seeks to confuse the facts and fails to recognize the distinction that this Court has made between government action (which entitles private actors to state action immunity) and illegal private party action (which destroys state action immunity). This distinction is at the core of Petitioner's complaint. Their argument incorrectly suggests that Petitioner's injuries were the result of governmental action and not caused by the illegal private activities of the Respondents. This is not a case in which governmental actors (the Department, the Board and the Commonwealth Court) made

unilateral decisions without participation by private actors (Respondents). It was the illegal private actions by Respondents that caused harm to Petitioner. In addition to the cases cited in Petitioner's brief on this issue (Pet. 3), the Third Circuit's opinion in this case directly conflicts with its opinion in *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) where the Third Circuit said at page 1267, footnote 8:

> "*Omni* and *Hallie* involved immunity of municipalities under the state action immunity doctrine, but the test to be applied in determining whether a state policy can support a claim of immunity is the same for municipalities as it is for private actors. The distinction between the two types of cases lies in the fact that private actors, unlike municipalities must prove a second proposition—that their actions were actively supervised by the state—to obtain immunity for their actions."

And as set forth in Petitioner's Brief (Pet. 15-19) there was no active supervision of Respondents' illegal conduct.

CONCLUSION

Petitioner requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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